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No. 95-773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM H. DEAN,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May 26 U.S.C. § 7206(2)—which provides criminal penalties for one who "aids or assists in, or procures, counsels, or advises" preparing or presenting a false or fraudulent tax return—be used to convict a taxpayer for assisting in preparing *his own* signed tax return?

LIST OF PARTIES

Petitioner in this Court is William H. Dean. Respondent is the United States. Potomac Systems Engineering, Inc., a Virginia corporation with no parent corporation and no subsidiaries, was a party to the proceedings in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case August 18, 1995.

OPINIONS BELOW

The ruling of the Court of Appeals is reported at 76 A.F.T.R.2d ¶ 95-6099, at 1995 U.S. App. Lexis 25811, at 1995 WL 493006, and in table at 64 F.3d 660. It is reproduced at A. 1a, *infra*.[1]

JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

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[1] References to "A." are to the appendix to this petition. References to "R." are to the record in the Court of Appeals.

STATUTE INVOLVED

Title 26 U.S.C. § 7206 provides in relevant part:

> "Fraud and false statements
>
> "Any person who—
>
> "(1) Declaration under penalties or perjury. —Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> "(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> . . .
>
> * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution."

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Virginia on four counts of violating 26 U.S.C. § 7206(2) by aiding and assisting in the preparation and filing of false individual income tax returns—his own. He was also convicted of three counts of aiding and assisting in the preparation and filing of false returns of the computer engineering services cor-

poration of which he was president and principal owner. His Form 1040 returns for 1986 through 1989 were alleged to be false in that they did not declare as income certain payments he received from the company, which he contended had been reimbursements of loans and business expenses he had advanced.

Prior to trial he moved to dismiss the four counts respecting his individual tax returns for improper venue. It was established without contradiction that he was at all relevant times a resident of Alabama, that the returns had been prepared by an accounting firm in Alabama, that all information he provided the accountant had been provided in Alabama, and that the returns had been filed in Georgia or Tennessee. The District Court at first dismissed the four counts for improper venue, but on an interlocutory appeal by the government, the Fourth Circuit summarily reversed that ruling. Petitioner continued to object to venue during and after the trial. He was convicted, sentenced to imprisonment, and ordered to pay fines and restitution.[2]

On appeal he continued the objection. In support of it he argued that the statute under which he was charged in those four counts, 26 U.S.C. § 7206(2), does not criminalize the aiding or assisting of *one's own* tax returns, but rather applies only to aiding or assisting the false returns of others. He pointed out that a different provision in the same statute, under which the government had declined to charge him—26 U.S.C. § 7206(1)—criminalizes subscribing to one's own false return. He

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[2] As the Court of Appeals noted, "the government previously conceded to us . . . that [the corporate returns charged in other counts] 'might not have resulted in reduced taxes for [the corporation].'" A. 12a. At resentencing the District Court agreed, Tr. Oct. 6, 1995 at 19, and petitioner's sentence was calculated based on the tax loss incurred from the personal returns for which he was convicted of aiding and assisting himself. See U.S.S.G. § 2T4.1 (1989). Hence petitioner's sentence to fifteen months' imprisonment depends on the validity of those four counts.

argued that the government, contrary to over fifty years of precedent, had charged him with aiding and assisting himself, and had done so in order to try him in Virginia (where it alleged aiding and assisting had occurred) instead of Alabama, his residence, where pursuant to 18 U.S.C. § 3237(b) he would have been entitled to trial if charged under § 7206(1) with subscribing to or filing a false return. The government told the court that

> "indeed he could have been tried in the District of Alabama for subscribing to his own false returns in the District of Alabama, but that doesn't mean that we are precluded from charging him under 7206[2] for aiding and assisting in the preparation of false returns by all of the conduct that he committed in the Eastern District of Virginia."

R. 854.

The Fourth Circuit disposed of petitioner's appeal in a *per curiam* opinion it designated not to be published. It did not discuss any of the cases and statutory history petitioner cited to show that § 7206(2) does not apply to a taxpayer's aiding and assisting himself. The court instead disposed of the contention summarily:

> "First, Dean contends that he should have been prosecuted under subsection (1) of section 7206 (subscribing to a false return), not subsection (2), because, he says, subsection (2) cannot reach one who assisted the preparation or presentation of his *own* false return. We disagree. The text of subsection (2) is quite broad and reaches Dean's scheme. It reaches, for example, anyone who '[w]illfully . . . procures . . . the preparation or presentation . . . of a [false] return . . . , whether or not such falsity . . . is with the knowledge or consent of the person authorized or required to present such return . . . .'"

A. 5a (emphasis and alterations in original). As its only authority it cited *United States* v. *Greger*, 716 F.2d 1275 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), a case in which the taxpayer had not signed

the return and the issue this petition presents was not addressed.

After the decision was rendered, the government filed a motion requesting the Court of Appeals to publish its opinion. The reason, the government said, was:

> "First, *this Court's opinion* should be published because it *provides important guidance concerning the scope of 26 U.S.C. § 7206(2)* and its application to persons who assist in the preparation of their own returns. It appears that *this opinion is the first to address explicitly the question of the applicability of § 7206(2) to a taxpayer who assists in the preparation of his own false return.* The Court's conclusion that § 7206(2) does reach such conduct is important to this and other circuits, especially given the fact that *§ 7206(2) is one of the statutes most frequently used* to prosecute tax offenses."

Government's Motion To Publish Opinion, U.S.C.A., 4th Cir., Oct. 19, 1995, at 1 (emphasis supplied), A. 13a-14a, *infra*. The motion was denied.[3]

REASONS FOR GRANTING THE WRIT

This case, like *Bailey* v. *United States*, No. 94-7448, and *Robinson* v. *United States*, No. 94-7492, raises poignantly the issue how federal criminal statutes are to be construed. In those cases, courts of appeals from many circuits had given broad interpretations to the criminal statute there in question. Here, by contrast, the Fourth Circuit's application of this criminal statute is in disagreement with what the other circuits and this Court have understood it to mean for over half a century. The Fourth Circuit has taken an old and familiar criminal statute whose meaning was clear, and added an entirely new meaning.

Federal statutes with "aid-or-assist" clauses are not interpreted to criminalize aiding or assisting one's self. See,

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[3] The opinion already appears in tax law reporters and on computerized legal research services. See p. 1, *supra*.

e.g., *Morgan* v. *United States*, 159 F.2d 85, 87 (10th Cir. 1947) (predecessor of 18 U.S.C. § 1262, punishing one who "assists" in importing liquor contrary to state law, does not punish assisting one's self); *Gebardi* v. *United States*, 287 U.S. 112, 118-19 (1932) (to violate Mann Act[4] prohibition of "aid[ing] or assist[ing] in obtaining transportation" for immoral purpose "she must, at the least, 'aid or assist' someone else").

This rule of interpreting "aid or assist" provisions stems from the well-established understanding of the common-law doctrine of aiding and abetting: "[a]iding and abetting . . . states a rule of criminal responsibility for acts which *one* assists *another* in performing." *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949) (emphasis supplied). "One cannot aid or abet himself," for that would be "charging an offense not known to the law." *United States* v. *Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984); *accord*, *e.g.*, *United States* v. *Shear*, 962 F.2d 488, 495 n.10 (5th Cir. 1992); *United States* v. *Doughty*, 460 F.2d 1360, 1363 (7th Cir. 1972).

That has always been the understanding for interpreting "aid or assist" provisions in criminal statutes. Federal statutes that punish "aiding or assisting" normally are "governed by the same principles as those of . . . the aiding and abetting statute." *United States* v. *Castro*, 621 F.2d 127, 129 (5th Cir. 1980) (18 U.S.C. § 752(a), "aiding or assisting" escape). The Fourth Circuit now has upset that understanding and added to the list of crimes in the Tax Code.

For over fifty years the Tax Code's aiding-and-assisting provision has been understood and invoked as applicable only to aiding another—not as a punishment for aiding one's self. The Government here was frank to acknowledge that it decided to charge petitioner under § 7206(2) as a device to circumvent petitioner's statutory venue protection. It said it wanted to try petitioner away from

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[4] Act of June 25, 1910, ch. 395, § 2, 36 Stat. 825.

the home venue to which he would be entitled if charged in the usual way under § 7206(1) for filing a false return.

The decision redesigns a well-understood old statute and vastly expands the government's charging authority in tax cases. It is also in direct conflict with what other circuits, through Judge Learned Hand and others, have said about the scope of this aiding-or-assisting statute. It also conflicts with the prior interpretation of the statute by this Court. After the decision, the government has not been reluctant to point out that the Fourth Circuit's holding here is "important to this and other circuits." A. 14a.

The Fourth Circuit has effectively amended a long-standing criminal provision of the Tax Code. Because the ruling conflicts with over a half century of decisions and—in the government's words—"especially given the fact that § 7206(2) is one of the statutes most frequently used to prosecute tax offenses," A. 14a, certiorari should be granted.

I. THE FOURTH CIRCUIT'S INTERPRETATION OF THE AIDING-AND-ASSISTING STATUTE CONFLICTS WITH A LONG LINE OF DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

The government acknowledged that for his failing to declare income on his individual returns, it could have charged petitioner the way other cases like this one have been charged up to now—for the familiar offense of subscribing to false returns, a violation of § 7206(1). R. 854. But, the government explained, if it had done so then by the special venue provision of 18 U.S.C. § 3237(b) he would have been entitled to trial on those counts in Alabama, which was the only place he provided information to the accountant, the place the returns were prepared and mailed, and also his residence. R. 854; see

United States v. *Rooney*, 866 F.2d 28, 31 (2d Cir. 1989); 1 U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 12.11 (7th ed. 1994). The government did not want petitioner to be able to exercise that right. So in a departure from over half a century of cases, it instead charged petitioner under a different statute—26 U.S.C. § 7206(2)—on the novel theory that he "did willfully aid and assist, and procure, counsel, and advise" the preparation and presentation *of his own income tax returns*. But it has been recognized since 1924 that 26 U.S.C. § 7206(2) punishes *assisting false tax returns of others*. It does not criminalize *assisting one's self*.

A. The Interpretation Departs From Over Fifty Years of Court of Appeals Cases.

Section 7206(2) has a long history, originating as § 1017(c) of the Revenue Act of 1924. It has been repeatedly reenacted since then.[5] The plain language of the statute itself excludes an extension to taxpayers themselves, for it provides that it applies "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return." 26 U.S.C. § 7206(2). That reference reflects that the statute was addressed to third persons who assist, and not to the taxpayer himself. Yet

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[5] Act of June 2, 1924, ch. 234, § 1017(c), 43 Stat. 253, 344. See also Revenue Act of 1926, Act of Feb. 26, 1926, ch. 27, § 1114(c), 44 Stat. 9, 116; Internal Revenue Code of 1939, Act of Feb. 10, 1939, ch. 2, § 3793(b), 53 Stat. 1, 468; Internal Revenue Code of 1954, Act of Aug. 16, 1954, ch. 736, § 7206(2), 68A Stat. 13, 852; Tax Equity and Fiscal Responsibility Act of 1982, Act of Sept. 3, 1982, § 329(c), 96 Stat. 324, 618; Tax Reform Act of 1986, Act of Oct. 22, 1986, § 2, 100 Stat. 2085, 2095. The present statute, as congressional reenactments have noted, is substantially unchanged from earlier provisions. *E.g.*, H.R. Rep. No. 1337, 83d Cong., 2d Sess. at 425 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. at 602 (1954). See also S. Rep. No. 398, 68th Cong., 1st Sess. at 45-46 (1924); H.R. Rep. No. 844, 68th Cong., 1st Sess. at 32 (1924); H.R. Conf. Rep. No. 97-760, 97th Cong., 2d Sess. at 579 (1982).

by the Fourth Circuit's holding, that statutory language would make no sense. The statute did not need to create an additional violation for taxpayers themselves, who already can be prosecuted under 26 U.S.C. § 7206(1) (subscribing to a false return), as well as 26 U.S.C. § 7201 (evading tax).

The history and purpose of the statute are very clear. Section 7206(2) was enacted because of the limitations on charging aiding and abetting. To convict of aiding and abetting, there must be another person, a guilty principal, who commits an offense. See, *e.g.*, *United States* v. *Mills*, 7 Pet. 138, 141 (1833). Tax preparers and similar third persons, however, sometimes were motivated to impress clients by producing returns that falsely understated tax liability, while the taxpayers remained unaware of the falsity. In such circumstances the taxpayers committed no offense, and therefore aiding and abetting could not be charged against the preparers. See *United States* v. *Egenberg*, 441 F.2d 441, 444 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971).

Therefore in 1924 the predecessor of § 7206(2) was added. Its purpose was to make assisting false returns a substantive crime in itself, in order to punish these third persons while eliminating any need to prove the taxpayer's guilt. Judge Learned Hand in the leading opinion explained the predecessor statute:

> "The purpose was very plainly to reach the advisers of taxpayers who got up their returns."

United States v. *Kelley*, 105 F.2d 912, 917 (2d Cir. 1939). As Congress said at the time, and the Ninth Circuit has recognized, § 7206(2) was intended by Congress to fill a gap, "to provide 'a complete system of penalties.'" *United States* v. *Poll*, 521 F.2d 329, 333 n.2 (9th Cir. 1975), quoting H.R. Rep. No. 844, 68th Cong., 1st Sess. at 32 (1924). *Accord, e.g.*, J. KLEIN, FEDERAL INCOME TAXATION 1679 (1929) (the statute "is directed against accountants, attorneys, and others who counsel and assist in the preparation of a fraudulent return").

Hence § 7206(2), although it creates and defines an independent offense, often is loosely referred to as the Tax Code's criminal aiding-and-abetting provision. *E.g.*, *United States* v. *Manko*, 979 F.2d 900, 902 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2993 (1993). It is not confined to professional tax preparers, and can reach a variety of other third persons who assist other people's false returns. See *United States* v. *Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976). But it remains in purpose, as Congress describes it, an "aiding and abetting" statute. S. Rep. No. 97-494, 97th Cong., 2d Sess. at 275 (1982). Until now no court has suggested the extraordinary and novel holding by which the Fourth Circuit has extended § 7206(2) to prosecution of taxpayers for assisting preparation of *their own returns*.

That § 7206(2) is not an added felony for taxpayers themselves is recognized throughout the reported cases. As the Second Circuit recently observed, citing Judge Hand in *Kelley*, "In fact, the guilt or innocence of *the taxpayer* for whom the return was filed is irrelevant to the question of *the adviser*'s guilt." *United States* v. *Rowlee*, 899 F.2d 1275, 1279 (2d Cir.), *cert. denied*, 498 U.S. 828 (1990) (emphasis supplied).

> "As Judge Learned Hand pointed out in *United States* v. *Kelley*, 105 F.2d 912, 917 (2d Cir. 1939), the purpose of these statutes was 'to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent.' In other words, a person who violates section 7206(2) . . . . becomes as much a principal as the taxpayer who owes the tax."

899 F.2d at 1278. See also, *e.g.*, *United States* v. *Borgis*, 182 F.2d 274, 277 (7th Cir. 1950):

> "defendant in the case at bar is not charged with making a false return of his own income but with

> falsifying the income tax returns of other persons. The applicable statute in such a charge is section 3793(b)(1) [predecessor of § 7206(2)]."

Cosgrove v. *United States*, 224 F.2d 146, 151 (9th Cir. 1954) (discussing various categories of "advisers" to whom the predecessor statute could apply).[6]

Research of all the reported prosecutions under § 7206(2) and its predecessors that could be located, numbering well over a hundred cases and dating back more than sixty years, reveals that, until the present case, there has been only *one* previous reported prosecution of a taxpayer under § 7206(2) for assisting in the preparation of a personal return he signed and filed. That lone prosecution was recent and also in the Fourth Circuit. *United States* v. *Hirschfeld*, 964 F.2d 318 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993). In that case, however, the novel expansion of the statute was not challenged by the defendant, and therefore was never ruled upon.

The Fourth Circuit cited as support *United States* v. *Greger*, 716 F.2d 1275 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). Yet in *Greger* the Ninth Circuit pointed out that a taxpayer who signs and submits an allegedly false return—as petitioner was charged here—is expected to be prosecuted under 26 U.S.C. § 7206(1), not § 7206(2). See 716 F.2d at 1276 n.1. The taxpayer there accordingly was prosecuted under § 7206(1) except for one tax year in which he had not signed the return, for which violation of § 7206(2) was charged. The taxpayer did

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[6] Until now, the government's enforcement policy for over half a century has conformed to the same understanding. For falsity in their own returns, taxpayers are charged under § 7206(1), reserving § 7206(2) for assisting false returns of others. The Justice Department's *Criminal Tax Manual*, in its explanation of "Persons Liable" under § 7206(2), includes a list of many exotic categories of assisters—but conspicuously omits any mention of prosecuting the very taxpayers themselves for assisting their own returns. See 1 U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 13.04[1] (7th ed. 1994).

not raise the challenge petitioner did here, that § 7206(2) does not permit conviction for aiding one's self; instead, in *Greger* it was argued (incorrectly) that § 7206(2) was simply an ordinary aiding-and-abetting statute, and required proof of a guilty principal. See 716 F.2d at 1277. That case is no support for the Fourth Circuit's holding; and even if it were, and if the Ninth Circuit agreed with the Fourth, conflict still would remain with the Second and Seventh Circuits' reading of § 7206(2), as well as this Court's.

B. The Interpretation Is Contrary to That by This Court.

This Court in *Achilli* v. *United States*, 353 U.S. 373 (1957), rejected a taxpayer's argument that filing a false tax return could be punished only by a misdemeanor statute. The opinion pointed out that

> "In addition, § 1017(c) [predecessor of § 7206(2)] requires petitioner to impute to Congress a desire to punish *one who assisted* in preparing a false return much more severely than *one who actually made the return with intent to evade.*"

353 U.S. at 378-79 (emphasis supplied). This Court also emphasized the need, in interpreting criminal tax provisions, for "avoidance of incongruities." *Id.* at 379.

The contrast drawn in *Achilli* between, on the one hand, the person "who assisted" in violation of § 7206(2), and on the other "one who actually made the return," is consistently reflected in over sixty years of cases. The Fourth Circuit has departed from them. The government acknowledges that the Fourth Circuit's holding is "important," and "the first" to make such a departure from the statutory understanding. A. 13a-14a. It now can plan more criminal tax prosecutions of taxpayers for aiding and assisting themselves, particularly when there are bothersome venue rights that can be circumvented.

II. THE DECISION VIOLATES THIS COURT'S HOLDINGS ON CONSTRUCTION OF CRIMINAL STATUTES, AND DENIES DUE PROCESS OF LAW.

Recently the government argued to this Court that the construction of a federal criminal statute

> "must . . . be informed by the principle that when Congress reenacts legislation that has been subject to a 'settled judicial construction,' the courts will 'apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them.' "

Brief for the United States, *Bailey* v. *United States* and *Robinson* v. *United States*, Nos. 94-7448 and 94-7492, filed July 31, 1995, at 32, quoting and citing *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 n.8 (1975).

Petitioner agrees. The law under which petitioner was convicted was enacted in 1924 and reenacted in, *e.g.*, 1926, 1939, 1954, 1982, and 1986. Congress has not changed it. And "[e]ven if the language and history of the Act were less clear . . . the Act could not properly be expanded as the Government suggests . . . ." *United States* v. *Enmons*, 410 U.S. 396, 411 (1973).

A. The Rule of Lenity.

Petitioner does not believe that this statute can even be called ambiguous. In its very text it differentiates between, on the one hand, the person who

> "[w]illfully aids or assists in, or procures, counsels or advises,"

and on the other

> "the person authorized or required to present such return."

26 U.S.C. § 7206(2). (Whether the latter person had knowledge of falsity, it provides, does not matter.) As

the cases make clear, the concept of aiding or assisting one's self, like the concept of aiding or abetting one's self, is an oxymoron that has long been rejected in the law. *E.g., Gebardi* v. *United States, supra*; *Nye & Nissen* v. *United States, supra; Morgan* v. *United States, supra.* And when Congress in 1982 created what it called a civil analogue to § 7206(2), it referred to aiding or assisting a false return "of another person." [7]

Text, structure, and history all confirm the interpretation by Judge Learned Hand, this Court, and others. But the Fourth Circuit in a single conclusory sentence accepted the government's "broad" new reading.[8] Yet even if that conflicting reading is enough, in spite of the past, to render this statute "ambiguous," there still is a well-established rule for construing ambiguous federal criminal statutes. Last year this Court held:

> "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."

United States v. *Granderson*, 114 S. Ct. 1259, 1267 (1994), citing *United States* v. *Bass*, 404 U.S. 336, 347-49 (1971). The rule of lenity applies of course to criminal tax statutes, *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-10 (1992) (opinion of Souter, J.), 2110 (Scalia, J., concurring in the judgment). Nor is this a case in which the government can plausibly contend that its new reading of "aids or assists" could "fall squarely within the common usage and dictionary

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[7] Congress added 26 U.S.C. § 6701 as "a new civil penalty analogous to the criminal penalty for aiding and abetting in the preparation or presentation of a false return or document." S. Rep. No. 97-494, *supra*, at 275. It specified that the statute punished one "who aids or assists in, procures, or advises" knowing the false return "will result in an understatement of the liability for tax *of another person*." 26 U.S.C. § 6701(a) (emphasis supplied).

[8] "The text of subsection (2) is quite broad and reaches Dean's scheme." A. 5a.

definitions of the terms." *Smith* v. *United States*, 113 S. Ct. 2050, 2060 (1993).

> "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher one only when Congress has spoken in clear and definite language. . . . If Congress desires to go further, it must speak more clearly than it has."

McNally v. *United States*, 483 U.S. 350, 359-60 (1987). "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See also, *e.g.*, *Crandon* v. *United States*, 494 U.S. 152, 168 (1990) ("we are construing a criminal statute and are therefore bound to consider application of the rule of lenity").

B. Due Process.

One reason the rule of lenity exists is to assure that it is legislatures, rather than courts, who expand the criminal law, and that fair warning is provided if crimes are added. *United States* v. *Bass*, *supra*, 404 U.S. at 348; *Bell* v. *United States*, 349 U.S. 81, 83-84 (1955); *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931).[9] "[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes . . . ." *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994), quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). The rule of lenity "is rooted in fundamental principles of due process." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979).

Petitioner argued to the Court of Appeals that

> "if—after straightforward statutory language, clear legislative purpose, and over half a century of

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[9] "The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law." *United States* v. *Thompson/Center Arms Co.*, *supra*, 112 S. Ct. at 2114 (Stevens, J., dissenting).

> jurisprudence—§ 7206(2) were suddenly reinterpreted to apply to taxpayers themselves, then constitutional limits on vagueness would not be satisfied."

Brief for Appellants, U.S.C.A., 4th Cir., at 26 (citing cases).

The Court of Appeals in its opinion simply ignored the due process issue. Yet this Court has repeatedly held that a criminal statute with a well-established area of application cannot, consistently with the Fifth Amendment, be used to punish a new range of conduct.

> "[J]udicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

Pierce v. *United States*, 314 U.S. 306, 311 (1941). Thus this Court found due process denied when after 95 years a criminal statute was given "an unforeseeable and retroactive judicial expansion" in order to expand the category of criminalized conduct. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352, 356-57 (1964); see also *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

One court of appeals observed, "A criminal proceeding pursuant to section 7206 'is an inappropriate vehicle for pioneering interpretations of tax law.'" *United States* v. *Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984), quoting in part *United States* v. *Garber*, 607 F.2d 92, 100 (5th Cir. 1979). An unprincipled extension of an old criminal statute beyond its sensible and long-understood meaning should not go unreviewed. When a major criminal tax provision which the government acknowledges is "frequently used" now is interpreted differently in different circuits, this Court should settle the matter.[10]

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[10] Petitioner is the second person to be convicted in the Fourth Circuit for aiding and assisting his own tax return. *See United States* v. *Hirschfeld*, *supra*.

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for argument. If it is not set for argument, the petition should be held and the judgment then vacated and remanded for reconsideration as appropriate in light of this Court's opinion in *Bailey* v. *United States* and *Robinson* v. *United States*, Nos. 94-7448 and 94-7492.

Respectfully submitted,

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November 15, 1995

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-5185

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM H. DEAN,
Defendant-Appellant.

No. 95-5186

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

POTOMAC SYSTEMS ENGINEERING, INCORPORATED,
Defendant-Appellant.

No. 95-5202

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM H. DEAN,
Defendant-Appellant.

No. 95-5203

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

POTOMAC SYSTEMS ENGINEERING, INCORPORATED,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Chief District Judge.
(CR-94-377-A)

Argued: June 8, 1995

Decided: August 18, 1995

Before RUSSELL, NIEMEYER, and MICHAEL, Circuit Judges.

Affirmed in part, vacated in part and remanded in part by unpublished per curiam opinion.

COUNSEL

ARGUED: John G. Kester, WILLIAMS & CONNOLLY, Washington, D.C., for Appellants. John Joseph Klein, Assistant United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Terrence O'Donnell, Paul B. Gaffney, Tae-Sik Yoon, WILLIAMS & CONNOLLY, Washington, D.C., for Appellants. Helen F. Fahey, United States Attorney, David G. Barger, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

A jury convicted William Dean for assisting the preparation and presentation of his corporation's and his own false tax returns, in violation of 26 U.S.C. § 7206(2). The corporation was convicted for subscribing to false tax returns, in violation of 26 U.S.C. § 7206(1). Dean and his corporation appeal. We affirm his convictions but remand for resentencing.

I.

William Dean lived in Maryland and maintained a residence in Alabama. He was the chairman, president, and 85 percent owner of a Virginia-based company, Potomac Systems Engineering, Incorporated (PSE). For four years, 1986 through 1989, Dean "skimmed" hundreds of thousands of dollars from PSE in the following ways. First, he submitted check request forms which falsely indicated that he was seeking an advance for either travel or business deductions. Second, he submitted falsified expense vouchers and receipts for various types of entertainment he had purportedly paid for in cash. Third, he had a substantial number of PSE checks ($500 each) drawn to the Crystal City Marriott, where he had check cashing privileges for up to $500. He regularly took the checks there and cashed them. Fourth, he had PSE checks drawn to various PSE employees, who in turn cashed the checks and returned the cash to him. All of this activity (with the exception of the cashing of the checks) took place at PSE headquarters in the Eastern District of Virginia. The money Dean skimmed was falsely charged to a PSE "selling expense" (business development) account, which recorded advances to Dean for cash expenses related to the development of PSE contracts with the Department of Defense.

Dean had an independent accountant in Alabama prepare his individual tax returns (IRS Form 1040). Dean did not report on his returns for tax years 1986, 1987,

1988 and 1989 the amount of money he skimmed from PSE, and he failed to tell his accountant that his adjusted gross income was understated. In addition, as a result of Dean's scheme, PSE's tax returns (IRS Form 1120) for tax years 1987, 1988 and 1989 had inflated selling expenses.

In September 1994 Dean and PSE were charged in a nine-count indictment in the Eastern District of Virginia for violating 26 U.S.C. §§ 7206(1) & (2). Counts One through Four charged Dean with aiding and assisting the preparation of his false personal income tax returns for tax years 1986 through 1989, in violation of § 7206(2). Counts Five through Seven charged Dean with aiding and assisting the preparation of PSE's false corporate returns for tax years 1987 through 1989, in violation of § 7206(2). Counts Eight and Nine charged PSE with subscribing to false corporate tax returns from 1989 through 1990 (specifically, for overstating selling expense deductions), in violation of § 7206(1).

Dean and PSE had a jury trial in December 1994. The jury convicted them on all counts. Dean's sentencing took place in February 1995. The district court used the 1989 edition of the Guidelines Manual because of ex post facto concerns. The court set Dean's base offense level at 12 because the tax loss fell between $70,000 and $120,000. The court then enhanced by two levels pursuant to § 3B1.1 for "abuse of position of trust." For each of Counts Two through Seven, Dean was sentenced to concurrent terms of 15 months, the lowest term in his guideline range. The court imposed the same concurrent term (15 months) for Count One, a pre-Guidelines conviction. In addition, the court fined Dean $28,180.80 and ordered him to pay to the IRS $81,508 in restitution, due immediately. PSE was placed on probation for six months, fined $50,000 and ordered to pay $74,562 in restitution.

Dean appeals his convictions and sentence. PSE appeals only the restitution order.

II.

A.

Counts One through Four charged Dean under § 7206 (2) for his involvement in the preparation and presentation of his fraudulent tax returns. Dean says the prosecution of these four counts was improper for the following reasons.

First, Dean contends that he should have been prosecuted under subsection (1) of section 7206 (subscribing to a false return), not subsection (2), because, he says, subsection (2) cannot reach one who assisted the preparation or presentation of his *own* false return. We disagree. The text of subsection (2) is quite broad and reaches Dean's scheme. It reaches, for example, anyone who "[w]illfully . . . procures . . . the preparation or presentation . . . of a [false] return . . . , whether or not such falsity . . . is with the knowledge or consent of the person authorized or required to present such return . . . ." [1]

Second, Dean argues that venue for these four counts was not proper in the Eastern District of Virginia. He says venue was proper only in Alabama because his tax returns were prepared there by his accountant and mailed from Alabama to the IRS in Tennessee or Georgia. But in rejecting a venue challenge in *United States v. Hirschfeld*, 964 F.2d 318, 321 (4th Cir. 1992), we said that the taxpayer-defendant there "read[] § 7206(2) too narrowly in focusing only on where the return was prepared, mailed, and filed." Here, Dean did more than earn income in the Eastern District of Virginia. While there he engaged in various acts to keep the IRS in the dark about the true extent of his income from PSE. These acts assisted the presentation of his false returns. Thus, we con-

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[1] *See United States v. Greger*, 716 F.2d 1275 (9th Cir. 1983) (taxpayer prosecuted under § 7206(2) for assisting the preparation of his false return), *cert. denied*, 465 U.S. 1007 (1984).

clude that venue was proper in the Eastern District of Virginia.[2]

Moreover, by virtue of his actions in the Eastern District of Virginia, Dean's misconduct involved more than mere "omission," and therefore we need not address Dean's alternative argument that § 7206(2) does not reach omissions.

B.

Counts One through Seven charged that Dean "did willfully aid and assist, and procure, counsel and advise" the preparation and presentation of false and fraudulent tax returns, in violation of § 7206(2). This charge mirrored the text of § 7206(2). Without objection by Dean, the district court instructed the jury that it could convict if it found that Dean "aided, assisted in, procured, counselled, advised, *or caused* the preparation and presentation of a [false] return . . . ." JA 603-04 (emphasis added).[3] The "or caused" language was not in the indictment and is not in the statute. Dean complains that

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[2] Dean takes the position that if he had created bogus documents in the Eastern District of Virginia and had given them to his tax preparer to attach to his Form 1040 (*e.g.*, false itemized deductions), then venue would properly lie in the Eastern District of Virginia. However, he says that is not his case. But we do not accept Dean's distinction. Dean's acts in the Eastern District of Virginia were part of an effort to conceal his income, income which could have showed up on, for example, a W-2 form but for Dean's actions. Dean would respond that had he decided to report to the IRS the money he skimmed, that money would not have shown up on a W-2 because it did not involve payment for services. But Dean misses the point. Had he desired more compensation from PSE and played by the rules, his increased compensation would not have come by way of random travel and entertainment vouchers or random checks drawn to the Marriott or PSE employees. Rather, such compensation probably would have come in the form of a higher salary or bonus or some other form of remuneration that likely would have been documented in one way or another.

[3] Elsewhere the court correctly instructed the jury without the word "cause."

the verb "cause" is broader than the other five verbs in the statute (aid, assist, advise, counsel and procure). He argues that the addition of the verb "cause" was a constructive amendment of the indictment and, consequently, amounted to plain error under our recent *en banc* decision in *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc) (holding that "constructive amendments of a federal indictment are error *per se*, and . . . must be corrected on appeal even when not preserved by objection").

A constructive amendment occurs when the possible bases for conviction are broadened beyond those appearing in the indictment. *Id.* at 710. The issue here is whether the district court's instruction so modified the essential elements of the offense charged that there is a substantial likelihood Dean was convicted for an offense other than that charged. For the reasons that follow, we do not think there was a constructive amendment (or plain error, for that matter).

First, there might very well be situations where one may cause someone to do something without aiding or assisting him. For example, a jury perhaps could find that X caused Y to do something, but did not aid or assist Y, (1) when X did not have the purpose or intent to bring about the result of Y's conduct or (2) when Y was an innocent party. But § 7206(2) expressly requires that X act "willfully" and does not require that Y be culpable. Accordingly, the district court below instructed the jury that Dean must have acted willfully [4] and that

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[4] The district court instructed the jury as follows:

> It must be established that the defendant's act must be willful. The word willful as used in the statute means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally with the the [sic] specific intent to do something which the law forbids, that is to say, for the purpose to either disobey or disregard the law. The defendant's conduct is not willful if he acted through negligence, inadvertence, justifiable excuse, mis-

it did not matter whether his accountant knew about the false income.

Second, the verb "cause" is essentially synonymous with the verb "procure," which is included within the statute. Black's Law Dictionary 1208 (6th ed. 1990) defines "procure" as follows:

> To initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect, or cause. To persuade, induce, prevail upon, or cause a person to do something. . . . Procure connotes action and means to cause, acquire, gain, get, obtain, bring about, cause to be done. . . .

Indeed, it appears that the verb "procure" is broader than the verb "cause."

In the final analysis, then, the district court's addition of the verb "cause" did not broaden the bases of conviction, and therefore there was no constructive amendment. Nor was there plain error. *See United States v. Cohen*, 617 F.2d 56, 58 (4th Cir. 1980) (per curiam). It is perhaps telling that some appellate courts have inadvertently included the word "cause" when paraphrasing § 7206(2). *See United States v. Dahlstrom*, 713 F.2d 1423, 1426 (9th Cir. 1983) ("to convict a person under Section 7206(2), the government must prove . . . defendants aided, assisted, procured, counseled, advised or caused the preparation and presentation of a false return"); *United States v. Perez*, 565 F.2d 1227, 1233-34 (2d Cir. 1977) ("Government had to prove . . . that Perez aided, assisted, procured, counseled, advised or caused the preparation and presentation of a return").

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take, or due to the good faith misunderstanding of the requirements of the law. (JA 606)

We note, too, that the Sentencing Guidelines base relevant conduct on "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or *willfully caused* by the defendant . . . ." U.S.S.G. § 1B1.3(a)(1)(A) (emphasis added).

III.

A.

Dean raises several challenges to his sentence.

1.

At Dean's sentencing, the district court accepted the government's position that Dean's unreported income totalled $291,000. The court increased Dean's base offense level accordingly pursuant to U.S.S.G. § 2T4.1. Dean says the court's tax loss figure was erroneous because, he says, the government failed to demonstrate by a preponderance of the evidence that his unreported income totalled $291,000.

The offense level of a defendant convicted under § 7206(2) is based on the "tax loss" to the government.[5] U.S.S.G. §§ 2T1.4, 2T4.1. "Tax loss" is defined as "the amount by which the greater of gross income and taxable income was understated," multiplied by 28% for individuals and 35% for corporations. U.S.S.G. § 2T1.3. The probation office found that Dean had a total unreported income in the amount of $291,100 during the three years covered by Counts Two through Four: $69,900 for 1987; $122,300 for 1988; and $98,900 for 1989. The probation office observed that "[n]one of the reported 'selling expenses' could be substantiated by [Dean] as legitimate," JA 696, and therefore treated them as illegitimate. In determining Dean's base offense level the probation office did not include the unreported income relating to Count One (tax year 1986), which the probation office calculated to be $39,335, because that was a pre-Guidelines count. In addition, to avoid double counting, the probation office ignored the tax loss relating to Counts Five through Seven (PSE's returns), which the probation

[5] As noted above, Dean was sentenced under the 1989 edition of the Guidelines Manual.

office calculated to be $95,534. Thus, the probation office came up with a total tax loss of $81,508 ($291,000 in unreported income multipled by 28%). Under the 1989 edition of the Guidelines Manual, a tax loss between $70,000 and $120,000 yielded a base offense level of 12, *see* U.S.S.G. § 2T4.1, which is what the probation office recommended.[6] At sentencing, the court asked Dean's lawyer whether he could get the total tax loss below $70,000, and his lawyer responded that he did not know and that he did not have a figure.

Dean says the district court's finding of a total tax loss of at least $70,000 was clearly erroneous because the government "failed to prove what portion of the payments received by [him] exceeded his expenditures or what he was owed." Brief of Appellants at 38. But the district court explained in its order denying Dean's motion for bond pending appeal that "[t]he government presented sufficient evidence at trial to support the $70,000 calculation." *See United States v. Pellerito,* 918 F.2d 999, 1002 (1st Cir. 1990) ("The sentencing judge has a right to use the evidence presented at trial in determining the sentence to be imposed."). The trial evidence supported the district court's finding that the monies Dean received from PSE and the associated selling expenses claimed by PSE were not legitimate. Consequently, the government satisfied its burden at sentencing of demonstrating by a preponderance of the evidence a tax loss of at least $70,000. The district court did not shift the burden to Dean at sentencing simply by asking him whether he could get the figure below $70,000. At that point the government had already satisfied its burden.

2.

Dean also challenges the district court's restitution order. The court ordered that Dean pay to the IRS

[6] Under the current edition of the Guidelines Manual, that range yields a base offense level of 14.

$81,508 in restitution, due immediately. By making restitution due "immediately," it appears that the court did not order restitution pursuant to 18 U.S.C. §§ 3583(d) and 3563(b)(3) as a condition of Dean's supervised release. Rather, as the government has conceded in its brief on appeal, the court must have ordered restitution pursuant to 18 U.S.C. § 3663. Section 3663, however, does not authorize restitution for violations of Title 26 of the United States Code (the Internal Revenue Code).[7] Therefore, the restitution order for Dean was without statutory authorization. *See United States v. Stout*, 32 F.3d 901, 905 (5th Cir. 1994). We remand for resentencing so that the district court may consider fully the issue of restitution as a condition of Dean's supervised release.

3.

The government appears to concede that, because Dean did not have a trust relationship with the IRS, the victim here, the district court erred in giving Dean a two-level abuse-of-a-position-of-trust enhancement pursuant to U.S.S.G. § 3B1.3. *See United States v. Moore*, 29 F.3d 175, 179-80 (4th Cir. 1994) (noting that "the question of whether an individual occupies a position of trust should be addressed from the perspective of the victim" (internal quotations omitted)). Without that enhancement, Dean's sentencing range drops from 15-21 months (Level 14, Criminal History 1) to 10-16 months (Level 12, Criminal History 1). The government points out that the district court, in response to Dean's Fed. R. Crim. P. 35(c) motion, recognized that the enhancement may have been in error, and the court said it would have given Dean the same sentence under the lower guideline range. Nevertheless, on remand the district court should formally reconsider Dean's sentence using the lower guideline range.

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[7] 18 U.S.C. § 3663(a)(1) says, "The court, when sentencing a defendant convicted of an offense under this title or [various sections of title 49], may order . . . that the defendant make restitution to any victim of such offense."

B.

The district court ordered PSE to pay to the IRS $74,562 in restitution. PSE challenges that figure, complaining the court failed to make a formal determination of the actual loss suffered by the IRS. PSE has a compelling argument here, for it appears that the IRS did not incur a loss as a result of PSE's inflated selling expenses. This is because if, as the government claims, the inflated selling expenses were really compensation to Dean, then that compensation would still be properly deductible by PSE. Indeed, the government previously conceded to us (in an appeal from a pretrial order of the district court) that "[t]he tax returns of PSE, while false as to material matters, might not have resulted in reduced taxes for PSE; whether corporate cash expenditures are characterized as 'selling' or 'salary' expenses, they still would be deductible for purposes of computing the corporation's taxable income." Moreover, PSE points out that even if none of the deductions would have been allowed, it could have carried forward large net-operating losses to offset that income. Thus, we vacate the restitution order relating to PSE and remand to the district court to make a formal determination of the actual loss, if any, to the IRS caused by PSE's inflated selling expenses.

IV.

We have considered all other arguments raised, and we find them to be without merit. We affirm the convictions and remand for resentencing.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED IN PART

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-5185
95-5186
95-5202
95-5203

UNITED STATES OF AMERICA

v.

WILLIAM H. DEAN AND POTOMAC SYSTEMS ENGINEERING, INC.

[October 19, 1995]

GOVERNMENT'S MOTION TO PUBLISH OPINION

For the reasons stated below, the United States respectfully requests pursuant to I.O.P. 36.5 that the Court publish its opinion in *United States v. William Dean And Potomac Systems Engineering, Inc.*, Nos. 94-5185, 95-5186, 95-5202, 95-5203.

First, this Court's opinion should be published because it provides important guidance concerning the scope of 26 U.S.C. § 7206(2) and its application to persons who assist in the preparation of their own returns. It appears

that this opinion is the first to address explicitly the question of the applicability of § 7206(2) to a taxpayer who assists in the preparation of his own false return. The Court's conclusion that § 7206(2) does reach such conduct is important to this and other circuits, especially given the fact that § 7206(2) is one of the statutes most frequently used to prosecute tax offenses.

Second, the Court's opinion also provides important guidance concerning the scope of venue in a § 7206(2) prosecution. Specifically, the Court's discussion of Dean's efforts to "keep the IRS in the dark" (slip op. at 5), efforts which the Court carefully recounted in its summary of the facts (slip op. at 3), provides clear examples of the types of concealment that constitute aiding and assisting in the preparation and presentation of a false tax return. The Court's opinion affirms that when such acts occur in the District of prosecution, venue is proper.

Third, the Court's opinion (slip op. at 6-8) provides a helpful analysis of the applicability of the Court's recent *en banc* decision in *United States* v. *Floresca*, 38 F.3d 706 (4th Cir. 1994) (*en banc*) to appellant's claim that the district court's jury instructions modified the elements of the charged offenses and thereby constructively amended the indictment.

Finally, the Court's examination of a number of Sentencing Guidelines issues (slip op. at 8-11) provides useful guidance to government counsel contemplating prosecutions under § 7206(2).

Counsel for the United States has discussed this motion with John G. Kester, Esquire, counsel for appellants. While appellants' counsel does not adopt each of the Government's assertions in the motion, counsel does not object to the Governments' motion to publish this Court's opinion.

Respectfully submitted,

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UNITED STATES ATTORNEY

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APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Title 26 U.S.C. § 7206 provides in part:

> Fraud and false statements
>
> Any person who—
>
> (1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not

such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

3. Title 18 U.S.C. § 3237 provides:

Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1986, or where venue for prosecution of an offense described in section 7201 or 7206 (1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a offence to twice be put in jeopardy of life or limb;

judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

Supreme Court, U.S.
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No. 95-773

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM H. DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner violated 26 U.S.C. 7206(2) by causing his accountant to prepare false and fraudulent tax returns for petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 64 F.3d 660 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1995. The petition for a writ of certiorari was filed on November 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on seven counts of assisting the pre-

paration and presentation of his own and his corporations's false tax returns, in violation of 26 U.S.C. 7206(2).[1] He was sentenced to 15 months' imprisonment, fined $28,180.80, and ordered to pay restitution. The court of appeals affirmed petitioner's convictions but vacated the sentence and remanded for resentencing. Pet. App. 1a-12a.

1. Petitioner was the chairman, president, and 85% owner of Potomac Systems Engineering, Incorporated (PSE), a Virginia-based corporation. From 1986 through 1989, he skimmed hundreds of thousands of dollars from PSE by various means. Specifically, he submitted check request forms falsely indicating that he was seeking advances for travel or business deductions. He submitted falsified expense vouchers and receipts for entertainment for which he had purportedly paid cash. He had numerous PSE checks for $500 each drawn to the Crystal City Marriott, where he had check cashing privileges for up to $500. Finally, he had PSE checks drawn to various PSE employees, who in turn cashed the checks and turned the cash over to him. Pet. App. 3a.

The money that petitioner skimmed from PSE was falsely charged to a PSE "selling expense" account that was supposed to record advances to petitioner for cash expenses related to the development of PSE contracts with the Department of Defense. Pet. App. 3a. The money was not included in the Internal Revenue

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[1] Petitioner's corporation was convicted of filing false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(1). On appeal, the court of appeals vacated the restitution order imposed on the corporation and remanded the case to the district court for further proceedings on the proper amount, if any, of restitution. Pet. App. 12a.

Service Form W-2 that petitioner received each year from PSE. Gov't C.A. Br. 6. Nor was it reported on petitioner's federal income tax returns for the years 1986 through 1989. Those returns were prepared by an accountant in Alabama, and petitioner failed to tell the accountant about the money he had skimmed. As a result of petitioner's conduct, his personal returns understated his adjusted gross income. In addition, PSE's returns for 1987 through 1989 overstated its selling expenses. Pet. App. 3a-4a.

2. The court of appeals affirmed petitioner's convictions under 26 U.S.C. 7206(2). Pet. App. 1a-12a. The court rejected petitioner's claim that Section 7206(2) does not apply to someone who assists the preparation of his own false return. Pet. App. 5a.[2] The court observed (*ibid.*) that the language of Section 7206(2) reaches cases in which the defendant aids in the preparation of his own false return.[3]

---

[2] 26 U.S.C. 7206(2) prescribes a fine or imprisonment, or both, for anyone who

> [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.

[3] In rulings that petitioner does not challenge in this Court, the court of appeals also rejected his arguments that venue was improper and that the jury instructions constructively amended the indictment. Pet. App. 5a-7a.

ARGUMENT

Petitioner challenges his convictions under 26 U.S.C. 7206(2) for assisting the preparation of his own false returns, contending that Section 7206(2) applies only to defendants who assist the preparation of someone else's false return.[4] The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

As the court of appeals determined, petitioner's conduct falls squarely within the broad language of Section 7206(2). Pet. App. 5a. Section 7206(2) applies to "any person" who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation * * * of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter." 26 U.S.C. 7206(2); see *United States* v. *Griffin*, 814 F.2d 806, 809 (1st Cir. 1987); *United States* v. *Perez*, 565 F.2d 1227, 1233-1234 (2d Cir. 1977). Petitioner procured the preparation of false returns by, among other actions, falsifying check requests, expense vouchers, and receipts. Pet. App. 3a. That conduct led to false entries in PSE's records, including petitioner's Forms W-2, and to the under-reporting of petitioner's income on his returns for 1986 through 1989. *Ibid.*

Contrary to petitioner's contention (Pet. 5-8), Section 7206(2) is not limited to cases in which the defendant assists in the preparation of a false tax

---

[4] Petitioner does not challenge his convictions under 26 U.S.C. 7206(2) for assisting the preparation of false returns for his corporation. See Pet. i, 3 n.2, 7.

return for someone else. The statute applies to "any person" who willfully assists the preparation of "a" materially false or fraudulent return (or other document). Petitioner errs in relying (Pet. 8) on language in Section 7206(2) providing that a person may be guilty of violating that provision "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document." That language makes clear that the defendant *may be* someone other than the "person authorized or required" to file the return or other document. But it does not compel the conclusion that the defendant *must be* someone other than the "person authorized or required" to file the return or other document. Indeed, when Congress wished to include such a limitation, it did so through explicit language not found in Section 7206(2). See Pet. 14 n.7, quoting 26 U.S.C. 6701(a) (providing civil penalties for aiding and abetting the understatement of tax liability "of another person").[5]

Petitioner also errs in relying (Pet. 5-6) on the principle that one cannot aid or abet oneself in the commission of a crime. Section 7206(2) is not merely an "aiding and abetting" statute. See *United States* v. *Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983), cert. denied, 465 U.S. 1007 (1984). Rather, it "delineates a substantive offense," *United States* v. *Griffin*, 814 F.2d at 809, that must be defined with reference to its

---

[5] Petitioner errs in asserting (Pet. 12) that the decision below conflicts with *Achilli* v. *United States*, 353 U.S. 373 (1957). *Achilli* held that the defendant's filing of a false tax return was properly prosecuted as a felony under Section 145(b) of the Internal Revenue Code of 1939, rather than as a misdemeanor under a separate statutory provision. 353 U.S. at 375-379. That holding is inapposite here.

own elements, see *United States* v. *Perez*, 565 F.2d at 1233-1234 (setting forth elements of Section 7206(2)).

Petitioner points out (Pet. 7, 11) that other cases involving facts similar to those of this case have been prosecuted under Section 7206(1).[6] Petitioner acknowledges (Pet. 11), however, that at least one other court of appeals decision affirmed a conviction under Section 7206(2) on similar facts. See *United States* v. *Hirschfeld*, 964 F.2d 318, 321-323 (4th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993). Yet another is *United States* v. *Greger*, *supra*, in which the Ninth Circuit upheld the conviction under Section 7206(2) of a defendant who gave false information to his innocent tax return preparer.[7]

---

[6] 26 U.S.C. 7206(1) prescribes a fine or imprisonment, or both, for anyone who

> [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties or perjury, and which he does not believe to be true and correct as to every material matter.

[7] Petitioner's attempt (Pet. 4-5, 11) to distinguish *Greger* is unavailing. Petitioner argues (Pet. 11), first, that Greger did not advance the same argument that petitioner has advanced in this case. Greger did argue, however, that, because his accountant was unaware that the information supplied by Greger was false, the government could not establish the existence of a guilty principal and, therefore, Greger could not be convicted under Section 7206(2). In rejecting that argument, the court stated that Section 7206(2) is "plainly broader" than "the traditional aider and abettor statute." *Greger*, 716 F.2d at 1277. That statement is equally applicable to, and requires the rejection of, petitioner's argument in this case, for reasons discussed in the text. Petitioner also suggests (Pet. 11) that *Greger* is distinguishable because, unlike petitioner, Greger did not sign the false return on which his conviction under Section

The fact that the government often charges cases involving similar facts under Section 7206(1) did not bar it from proceeding under Section 7206(2) in this case. When conduct violates more than one criminal statute, the prosecutor has broad discretion to proceed under any of the applicable statutes. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 859 (1985); *United States* v. *Batchelder*, 442 U.S. 114, 123-125 (1979). The prosecutor acted well within that discretion here. Petitioner's conduct went beyond subscribing to false returns. He falsified records and documents knowing that they would be used to create corporate records for PSE that would under-report the income he received, and knowing that those false records would be used in the preparation of tax returns for petitioner and his corporation. Compare *United States* v. *Cutler*, 948 F.2d 691, 696-697 (10th Cir. 1991); *Greger*, 716 F.2d at 1277; *United States* v. *Crum*, 529 F.2d 1380, 1383 (9th Cir. 1976).[8]

7206(2) was based. See *Greger*, 716 F.2d at 1276 n.1. The Ninth Circuit did not state or imply, however, that Section 7206(2) would have been inapplicable if Greger had signed the return. The court presumably noted that Greger had not signed the return merely to explain why he could not have been prosecuted under Section 7206(1).

[8] Moreover, to the extent that cases involving similar facts are seldom prosecuted under Section 7206(2), the question presented here lacks sufficient importance to warrant review by this Court. Contrary to petitioner's suggestion (Pet. 7), the government did not, in moving (unsuccessfully) to have the court of appeals publish its decision, suggest that the decision was worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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IN THE

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REPLY TO BRIEF IN OPPOSITION

1. *Bailey* v. *United States*, 116 S. Ct. 501 (1995), unanimously decided December 6, 1995, calls for review or summary reversal of the Fourth Circuit's decision here. The petition was filed shortly before *Bailey* was decided, and pointed out the *Bailey* case as raising similar issues of criminal statutory interpretation. Pet. Cert. 5, 13, 17. The Brief in Opposition, filed several weeks after *Bailey*, chooses to ignore it. *Bailey* and the Fourth Circuit's decision are irreconcilable.

—*Bailey* calls for examination first of the statutory text. 116 S. Ct. at 506. "Aid or assist" in every previous court decision, like "aid or abet," does not mean helping one's self. There is not a single case that suggests it could. This is an axiom of federal criminal law. "Aiding and abetting . . . states a rule of criminal responsibility for acts which *one* assists *another* in performing." *Nye & Nissen* v. *United States*, 336 U.S. 613, 620 (1949) (emphasis supplied). The same is true for federal "aid or assist" statutes. *Gebardi* v. *United States*,

287 U.S. 112, 118-19 (1932); *Morgan* v. *United States*, 159 F.2d 85, 87 (10th Cir. 1947); see Pet. Cert. 5-6.

—*Bailey* calls for considering "not only the bare meaning of the word but also its placement and purpose in the statutory scheme." 116 S. Ct. at 506. The statutory scheme here could not be clearer. The "aid or assist" offense of 26 U.S.C. § 7206(2), first enacted in 1924, was added, in the words of Judge Learned Hand, "to reach the advisers of taxpayers who got up their returns." *United States* v. *Kelley*, 105 F.2d 912, 917 (2d Cir. 1939); *accord*, *United States* v. *Rowlee*, 899 F.2d 1275, 1279 (2d Cir.), *cert. denied*, 498 U.S. 828 (1990); *United States* v. *Borgis*, 182 F.2d 274, 277 (7th Cir. 1950).

—*Bailey* explains that "[t]he meaning of statutory language, plain or not, depends on context." 116 S. Ct. at 506, quoting *Brown* v. *Gardner*, 115 S. Ct. 552, 555 (1994). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Bailey*, 116 S. Ct. at 507, quoting *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Section 7206(1) already punishes taxpayers who file false returns. This Court in *Bailey* cited with approval the dissent in *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting), which admonishes that "courts normally try to read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense." Unless the Fourth Circuit's new interpretation—that it is now a crime for taxpayers to aid or assist themselves—is reversed, not just "context" but "common sense" will be ignored.

—*Bailey* points out that sometimes "[t]he amendment history . . . casts further light." 116 S. Ct. at 507. The legislative history here could not be plainer. It shows that the sole purpose of adding § 7206(2) in 1924 was to reach persons other than the taxpayer, persons who in some instances would not otherwise be punishable as aiders or abbettors. That was the contemporaneous

understanding, has been the understanding ever since, and until recently had been the Justice Department's understanding as well. See J. KLEIN, FEDERAL INCOME TAXATION 1679 (1929); 1 U.S. DEPARTMENT OF JUSTICE, CRIMINAL TAX MANUAL § 13.04[1] (7th ed. 1994); Pet. Cert. 9-11. Under the government's reading of § 7206(2), which the Fourth Circuit adopted, § 7206(1) is quite superfluous. *But cf. Bailey*, 116 S. Ct. at 507: "Nothing here indicates that Congress, when it provided these two terms, intended that they be understood to be redundant."

The Fourth Circuit's novel construction does not begin to satisfy the requirements for construing a criminal statute that this Court set forth and applied in *Bailey*. The government once again is taking the same unconfined approach to construction of criminal statutes that it urged unsuccessfully in *Bailey*.

2. All that the government finds to say about *Achilli* v. *United States*, 353 U.S. 373, 378-79 (1957)—which contrasted "one who assisted" in violation of the predecessor of § 7206(2), with "one who actually made the return"—is that this Court's explanation of the statute was not the case's holding. Br. Opp. 5 n.5 (typescript filing). It was indeed this Court's dictum—dictum reflecting the same understanding of § 7206(2) that every other court has had until now.

3. The government suggests that "cases involving similar facts are seldom prosecuted under Section 7206(2)." Br. Opp. 7 n.8. That is exactly the point. Such prosecutions have occurred not just *seldom*, but essentially *never*. It was not thought possible. The government has cited not a single previous case of such a prosecution, except for one brought in the Fourth Circuit in 1992, in which the issue was never raised or considered, *United States* v. *Hirschfeld*, 964 F.2d 318 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993), and another involving an unsigned return in which likewise the issue was neither raised nor passed upon. *United States* v. *Greger*, 716 F.2d 1275 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). Both are discussed at Pet. Cert. 11-12.

4. The importance of this case is not just that it creates a new federal crime to be used against taxpayers. What the decision means is that the government now will be able—exactly as it did here—to prosecute taxpayers who file false returns under § 7206(2) instead of § 7206(1), and thereby deny many of them the important home venue protections that Congress specifically enacted in 18 U.S.C. § 3237(b). The government does not attempt to deny, and in the district court it even acknowledged, see Pet. Cert. 7, that that is the real prize at stake here. That is why the government previously trumpeted the Fourth Circuit's decision as "important guidance," a "first," "important to this and other circuits." Pet. Cert. App. 13a-14a. But now the government tells this Court that it did not mean to "suggest that the decision was worthy of review by this Court." Br. Opp. 8 n.8. It has been observed that "The United States is the most frequent, and hence the most calculating, of our litigants." *Stutson* v. *United States*, 64 U.S.L. WEEK 3459, 3464 (1996) (Scalia, J., dissenting).

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted and the case set for argument; alternatively, the judgment should be vacated and the case remanded for the Fourth Circuit to apply the analysis prescribed in *Bailey* v. *United States, supra.*

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